83-890

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ALEXANDER L. STEVAS,
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1983

UNITED STATES OF AMERICA, Respondent

v.

ALBERT SPIELVOGEL, Petitioner

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Alan Ellis, Esquire,
Member of the Bar of the Supreme Court

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QUESTIONS PRESENTED FOR REVIEW

I. Were the petitioner's fundamental rights to a fair trial under the Sixth Amendment, and to due process under the Fifth Amendment to the United States Constitution violated where the trial court refused to charge the jury that in order to convict for conspiracy, the government had to prove beyond a reasonable doubt that the petitioner knew of and agreed to each of the two objectives charged in the conspiracy Indictment?
(Answered in the negative by the court below.)

II. Were the petitioner's fundamental rights to a fair trial under the Sixth Amendment and to due process under the Fifth Amendment to the United States Constitution violated where the government refused to disclose evidence in their possession which it was absolutely required to disclose pursuant to decisions of this Honorable Court?
(Answered in the negative by the court below.)

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JURISDICTION

Jurisdiction is conferred upon this Honorable Court by virtue of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner, Albert Spielvogel, was convicted of conspiracy to manufacture and distribute methamphetamine and to distribute and possess with the intent to distribute phenyl-2-propanone (P2P), and with the manufacture or aiding and abetting the manufacture of methamphetamine after a jury trial in front of the Honorable Clarence C. Newcomer of the United States District Court for the Eastern District of Pennsylvania on May 20, 1982.

On July 30, 1982, he was sentenced to two consecutive five year terms of imprisonment, a $5,000 fine for each charge, and was also sentenced to five years special parole as to Count 2, the manufacture of methamphetamine. On appeal to the United States Court of Appeals for the Third Circuit, his conviction was affirmed, wherein only one of his four issues was even addressed

by the court on its merits. U.S. v. Gomberg, (Appeal of Spielvogel), 715 F.2d 843 (3rd Cir. 1983).

Count 1 of the Indictment charged Mr. Spielvogel with participating in a conspiracy from May, 1978, to the time of the indictment; the objects of the conspiracy being to manufacture and distribute methamphetamine, and to distribute and possess with the intention of distributing phenyl-2-propanone (P2P), both non-narcotic, Schedule II controlled substances. Count 2 charged Mr. Spielvogel with the manufacture of methamphetamine, (or the aiding and abetting thereof), between September, 1978, and October 3, 1978.

Ronald Raiton was the government's principal witness at trial. Raiton testified extensively as to Mr. Spielvogel's participation in Raiton's plans to import P2P into this country. Raiton also testified that in the fall of 1978, he asked Mr. Spielvogel to obtain a chemical, phenylacetone, from the

J. T. Baker Chemical Company in New Jersey. The government admitted that P2P was not a controlled substance in 1978, and it did not become so until 1980. Raiton told Mr. Spielvogel that the chemical was to be obtained for shipment overseas, and he did not tell Mr. Spielvogel the real purpose for purchasing the chemical or even that it could be used to manufacture methamphetamine. Raiton also testified that Mr. Spielvogel did not question the use of phenylacetone, and that he and Mr. Spielvogel had previously been engaged in the brokering of chemicals such as urea, a fertilizer. Mr. Spielvogel was told, according to Raiton, that he would not only arrange the purchase of the chemical, but would also handle its shipment to foreign buyers. Mr. Spielvogel was to be paid on a per gallon basis for these services.

The only showing the government made with regard to the manufacture of methamphetamine charge was that on September 19, 1978,

Mr. Spielvogel purchased four 500-gram bottles of P2P from the J. T. Baker Chemical Company, and that on September 25, 1978, Mr. Spielvogel again purchased 24 500-gram bottles from the same company. This was the only proof of any purchase of P2P from J. T. Baker Chemical Company by Mr. Spielvogel in 1978. Further, Mr. Raiton testified that in October and November of 1978, he sold the same P2P to individuals named Sella and Stevens, unbeknownst to Mr. Spielvogel.

Despite the foregoing testimony, the jury convicted Mr. Spielvogel of the substantive charge of manufacturing methamphetamine between September and October 3, 1978. Raiton and co-defendant DeSantis were involved with two individuals named Jesse and Hardy who operated a laboratory in which they were attempting to manufacture methamphetamine. Both Jesse and Hardy testified that they had attempted unsuccessfully to manufacture methamphetamine for several months beginning in

mid-1978. Hardy testified that he obtained P2P, the necessary chemical in the manufacture of methamphamine on three occasions. Once he obtained it at the apartment of a friend of co-defendant DeSantis', another time from co-defendant Gomberg, and once directly from Raiton and DeSantis themselves. Jesse corroborated Hardy and further testified that Gomberg provided bottles of P2P worth $3,000 each (e.g. one gallon bottles, and not the 500-gram bottles Spielvogel obtained from J. T. Baker). Moreover, Raiton testified that Mr. Spielvogel delivered the September 19, 1978, order directly to Raiton and DeSantis, and that Mr. Spielvogel turned over the September 25, 1978, order to Mr. Gomberg in Philadelphia at Raiton's instruction. Raiton then told the jury that Gomberg took the 24 bottles of P2P to an apartment in Maple Shade, New Jersey, where Raiton and DeSantis met him and that DeSantis gave the P2P to Jesse and Hardy. On October 3, 1978, Jesse and Hardy were finally successful in

manufacturing methamphetamine; Hardy and DeSantis were arrested by Philadelphia police when Hardy attempted to deliver this to DeSantis.

In April, 1981, Ronald Raiton received a five year sentence from Judge John P. Fullam on an unrelated cocaine conviction. As a result of that sentence, Raiton began cooperating with FBI agents on an undercover basis and recorded certain conversations that he had with persons who were subsequently indicted. Thereafter, Raiton signed an agreement with the federal government whereby he agreed to testify against certain persons, plead guilty to a two-count Indictment, and receive a concurrent six and one half year sentence. In exchange, the government agreed to bring no further criminal charges against him, specifically income tax charges, take no position on any subsequent request for parole, or the return of his passport, and not to oppose any request by him to leave

the country after service of his sentence. Raiton was also placed in the Federal Witness Protection Program.

During the period of time in 1981 when Raiton was working with the FBI in an undercover capacity, he entered into a series of personal financial transactions with employees of the United States Department of Justice. He sold his $110,000 condominium in Florida to an FBI agent for $83,000; and the agent was not required to make a down payment. Further, he gave Raiton a promissory note for $10,000 at one percent interest payable in one year. Additionally, Raiton sold household furnishings he valued at $12,000 to another FBI agent for $6,000 to be paid in installments of $100 per month. Other items of personal property, including hand guns, were either sold or given to law enforcement officers. Finally, most outrageous of all, Raiton made a $50,000 loan to former first assistant United States attorney Joseph

Fioravanti. At the time, in 1980, Fioravanti was the law partner of William Winning, Raiton's attorney.

Raiton admitted that he has approximately $2 million in foreign accounts under fictitious names, for which he earns interest. At trial, the trial court denied the defense access to important information surrounding the Justice Department investigation of these matters, as well as the full extent of Raiton's prior criminal record and other discoverable material.

Mr. Spielvogel now files the instant petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

SUMMARY OF THE ARGUMENT

Since the conspiracy count of the Indictment lists two illegal objects as the indispensable elements of the conspiracy, the government must prove each object beyond a reasonable doubt before a conviction can be sustained. The government was free to bring two counts of conspiracy or limit themselves to one objective in the conspiracy count, presumably broad enough to encompass each object. But, having elected to charge the way they did, the government had to prove each objective in order to convict. Further, deciding the proof was sufficient to convict after proof of only one object being fulfilled by the defendant unfairly, improperly and illegally worked a de facto amendment of the Indictment at the time of trial all to the petitioner's great prejudice in that such action violated the Sixth and Fifth Amendments to the United States Constitution by reducing

the burden the government had to meet at trial.

Moreover, the court erred when it refused to order and insure the petitioner's open access to material in possession of the government which contained evidence the government was required to disclose to the defendant. Ronald Raiton, who was the primary witness in the case, had extraordinary and outrageous personal dealings with prosecutors and law enforcement agents. Yet much of the information about these acts was kept from the defense in spite of specific requests therefor. The government even successfully blocked defense attempts to subpoena the appropriate witnesses. The ultimate result was a denial of the Sixth and Fifth Amendment rights to a fair trial and due process respectively. It is also noted these actions violated holdings of this Honorable Court.

ARGUMENT

I. THE PETITIONER'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT, AND TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHERE THE TRIAL COURT REFUSED TO CHARGE THE JURY THAT IN ORDER TO CONVICT FOR CONSPIRACY, THE GOVERNMENT HAD TO PROVE BEYOND A REASONABLE DOUBT THAT THE PETITIONER KNEW OF AND AGREED TO EACH OF THE TWO OBJECTIVES CHARGED IN THE CONSPIRACY INDICTMENT.

Albert Spielvogel was convicted by the jury on Count 1 of the Indictment which charged him with a conspiracy having two objects: (1) to manufacture and distribute methamphetamine, and (2) to distribute and possess with the intent to distribute P2P. The jurors should have been instructed that in order to convict on Count 1, they had to find beyond a reasonable doubt that the defendant

in question entered into a conspiracy knowing that the conspiracy had two objects. Proposed instructions containing this language were presented to the trial court and refused. Additionally, Mr. Spielvogel objected to the charge as given, and again requested a specific charge that the conspiratorial agreement must contemplate the two objects charged in the Indictment. At the urging of the government, the trial judge refused the request. During the course of its deliberations, the jury requested a clarification of the charge of conspiracy. Again, counsel urged the court to instruct the jury that there must have been proof beyond a reasonable doubt of the precise conspiracy charged by the Grand Jury, and drafted in the Indictment, and contended that to permit the jury to base a guilty verdict on a finding of conspiracy to commit one of the two objects charged would constitute a variance and a constructive amendment of this Indictment.

Once again, the government opposed the requested instruction, and the court denied Mr. Spielvogel's request.

The trial judge initially charged the jury that the Indictment is merely an outline of the charge and no more. While this instruction, in context, was accurate, it might also tend to permit the jury to not consider the precise conspiracy charge by the Grand Jury. As to conspiracy, the court charged:

> "The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods set forth in the Indictment were in fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation."

This portion of the charge, while technically correct, and applicable in most conspiracy cases, was impermissibly broad and confusing in the instant case in which the alleged objectives of the conspiracy were two fold. The jurors, not trained in the law, may not be presumed to know the difference between means or methods and objects of the conspiracy. This portion of the charge could easily permit the jurors to conclude that if the defendants had entered into an agreement having only one of the objects charged, then he could be convicted. Similarly, this error was reinforced when the court told the jurors that one may be a member of a conspiracy without full knowledge of the details of the alleged unlawful scheme.

The further vagueness of the charge is demonstrated by the succeeding sentence:

> "So, if a defendant with an understanding of the unlawful

> character or a plan knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy."

Thus, the jurors again could conclude that a defendant could be convicted under Count 1 upon a finding of agreement and/or involvement in only one object of the conspiracy charged by the Grand Jury. This erroneous conclusion was likely despite some references in the instruction to the conspiracy offense as alleged in the Indictment, or the conspiracy as charged. After all, having made each objective an integral part of the conspiracy Indictment, the government was bound to at least prove beyond a reasonable doubt that Albert Spielvogel knew of these two objectives when he entered into a conspiracy. In essence, proof of each objective becomes an essential element for the government or prove beyond a reasonable

doubt in order to convict Mr. Spielvogel of criminal conspiracy.[1]

Moreover, in deciding that the evidence was sufficient to convict upon the proof of Mr. Spielvogel's knowledge or intent as to only one of the two objects of the criminal conspiracy, the government was given a windfall of a de facto amendment to their conspiracy Indictment which permitted Mr. Spielvogel's conviction on less than the proof required by the very language of the Indictment.

In Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), the Supreme Court held that deletion from an indictment of one of two persons allegedly deceived by the defendant's acts constituted an impermissible amendment of the grand jury's

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[1]For instance, in Pennsylvania, the Pennsylvania Supreme Court recently announced that absent evidence that the defendant knew of the objectives of the criminal conspiracy, his conviction therefore cannot stand. Commonwealth v. Derr, ___ Pa. ___, 462 A.2d 208 (1983).

indictment. See also Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L. Ed.2d 252 (1960).

As previously stated, the government could have charged two separate counts of conspiracy, or could have charged one conspiratorial object broad enough to encompass the two objectives listed in the Indictment. Instead, it chose to structure its Indictment for conspiracy as containing two objectives. Thus, Mr. Spielvogel's only notice of the crime charged is the description of the object or objects of the conspiracy in the Indictment returned by the Grand Jury. When that Indictment specifies more than one object, a defendant must be entitled to rely on such notice in his trial preparation, and in defense of his case. Furthermore, since the Indictment is a creation of the prosecutor, the government should be strictly held to meet its full burden in

accordance with the language of its own allegation.

The essence of a conspiracy is an agreement. An agreement is a meeting of the minds. If a defendant is shown only to have agreed to participate in furthering only one object of a conspiracy which has two objects, he is not guilty of that conspiracy as charged. Since the Indictment is the charging document in this case, the government had failed to meet their proof while at the same time obtaining a windfall of a de facto amendment of the Indictment which eliminates the need to show that proof.

Under these circumstances, Mr. Spielvogel's rights under the Sixth and Fifth Amendments to the United States Constitution were violated.

II. THE PETITIONER'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT AND TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHERE THE GOVERNMENT REFUSED TO DISCLOSE EVIDENCE IN THEIR POSSESSION WHICH IT WAS ABSOLUTELY REQUIRED TO DISCLOSE PURSUANT TO DECISIONS OF THIS HONORABLE COURT.

The credibility of key government witness Ronald Raiton was a crucial issue at trial. In fact, it is not unrealistic to classify Ronald Raiton as the star witness for the government. The unusual circumstances under which Raiton's agreement with the government was entered into some six months after he began his undercover activities and after certain personal financial transactions with federal employees had been engaged in, set this situation apart from the norm. Beyond compelled disclosure of certain minimal statements and affidavits,

the trial judge refused to permit the defendants access to much of the existing evidence surrounding Raiton's dealings with the government. The reports and documents generated during the government's own internal investigation of the conduct of Department of Justice employees with Raiton were denied to the defendants. While the court did order the government to turn over all material properly disclosable under the case of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), no document reflecting the scope, result or conclusion of the government's internal investigation was provided.

Also, very little regarding Raiton's tax liability nor information regarding the amount of money earned by Raiton from his drug dealing activities as well as the extent of his criminal dealings and truthfulness was provided.

This Court has stated that when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the general rule of Brady v. Maryland, supra. Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).[2]

Finally, no one in the federal government was even able to locate Ronald Raiton's criminal extract and the trial court denied the defendants access to Raiton's pre-sentence investigation report. And, if that is not sufficient, the court denied a pre-trial evidentiary hearing into the nature and extent of Raiton's personal dealings with federal employees, as well

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[2]In fact, the court did order the government to turn these documents, but however, they failed to do so, and Mr. Spielvogel's prior counsel did not pursue the matter. Moreover, the government claimed that many documents concerning Raiton were 'lost' and could not be located.

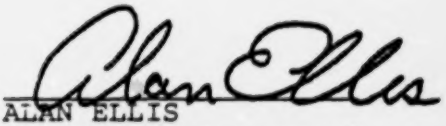
as quashing the defendants' trial subpoenas issued to people with knowledge of facts and circumstances surrounding such dealings.

Obviously, this wholesale denial of vital and exculpatory impeachment material violates the decisions embodied in Brady v. Maryland and its progeny. For these reasons, Mr. Spielvogel's Fifth and Sixth Amendment rights under the United States Constitution were clearly violated, and this petition for writ of certiorari should be granted.

CONCLUSION

Wherefore, for all of the above-cited reasons and circumstances, the petitioner, Albert Spielvogel, respectfully requests this Honorable Court grant his petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



ALAN ELLIS
Member of the Bar of
the Supreme Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1258/1534, 82-1477, 82-1478,
82-1479, 82-1485

UNITED STATES OF AMERICA,
Appellee

v.

DAVID GOMBERG,
Appellant in Nos. 82-1258/1534

UNITED STATES OF AMERICA,
Appellee

v.

HAROLD LEVY,
Appellant in No. 82-1477

UNITED STATES OF AMERICA,
Appellee

v.

MICHELLE D'AMICO,
Appellant in No. 82-1478

UNITED STATES OF AMERICA,
Appellee

v.

ALBERT SPIELVOGEL,
Appellant in No. 82-1479

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH DISANTIS, JR.
Appellant in No. 82-1485

APPENDIX A

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. Nos. 82-00012 and 82-00013)

Argued April 28, 1983

Before: WEIS and HIGGINBOTHAM, *Circuit Judges*, and BROTMAN, *District Judge**

Opinion Filed August 30, 1983

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OPINION OF THE COURT

WEIS, *Circuit Judge*.

In these appeals from drug convictions, we reject the defendants' contention that a count charging a conspiracy with two objectives was duplicitous. We also find no merit to the challenge that there was a variance between the conspiracy alleged in the indictment and the evidence produced at trial. We agree, however, that a defendant sentenced under the Comprehensive Drug Abuse Prevention and Control Act for engaging in a continuing criminal enterprise should not also receive separate sentences for conspiracy and the underlying predicate offenses. As to the defendant convicted of the continuing criminal enterprise, we remand for resentencing. The convictions and sentences of the other defendants are affirmed.

A six-count indictment charged Joseph DiSantis, Jr., David Gomberg, Albert Spielvogel, and Michelle D'Amico with violations of the Comprehensive Drug Act, 21 U.S.C. §801 *et seq*. Count One charged all defendants with conspiracy under section 846 "to manufacture and distribute methamphetamine, and to distribute and possess with the intent to distribute phenyl-2-propanone." Harold Levy was charged in a separate indictment with participating in the conspiracy. The main indictment further alleged that defendants had violated various substantive provisions of the Act. In addition, DiSantis was charged with engaging in a continuing criminal enterprise, *id*. §848.

The two indictments were consolidated for a jury trial which lasted thirteen days. Much of the evidence came from Ronald Raiton, a leader of the conspiracy who testified for the prosecution as part of a plea bargain. The jury found defendants guilty as charged, except that D'Amico was acquitted on one count.

Defendants raise numerous issues in these appeals, but after careful review we deem it necessary to discuss only a few of them in detail. The appendix to this opinion lists the remainder of the contentions, all of which we find without merit.

I

Defendants contend that the indictment was duplicitous because the conspiracy count charges them with two separate offenses. They also argue there was a variance between the conspiracy charged in the indictment and the proof offered at trial.

Duplicity is the joining of two or more distinct offenses in a single count, so that a general verdict does not reveal exactly which crimes the jury found the defendant had committed. 1 C. Wright, FEDERAL PRACTICE AND PROCEDURE §142 (1982). According to defendants, Count One charges two separate conspiracies — one to manufacture and distribute metham-

phetamine, and another involving P2P. They rely on *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975), where we instructed trial courts to require the government to elect between duplicitous charges at trial, or else suffer dismissal of the indictment.

Starks does not support the defendant's position. The single-count indictment in that case charged the defendants with conspiracy to extort and attempt to extort — two separate crimes. In contrast, the count at issue here charges defendants with only one crime: a conspiracy. Although the illegal agreement had two objectives, the count is not duplicitous. " 'The conspiracy is the crime, and that is one, however diverse its objects.' " *Braverman v. United States*, 317 U.S. 49, 54 (1942), *quoting Frohwerk v. United States*, 249 U.S. 204, 210 (1919). *See also* W. LaFave and A. Scott, CRIMINAL LAW §62 (1972) ("An agreement to commit several crimes is but one conspiracy."). Accordingly, we reject the defendant's duplicity attack.

We turn next to the variance argument. Defendants assert the proof at trial showed the existence of many different and unrelated conspiracies, and the spillover of evidence prejudiced them. They rely on *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Supreme Court reversed the convictions of individuals who had been indicted as participants in a single conspiracy because the prosecution proved the existence of several unrelated schemes. *See also United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982). In reviewing the defendants' argument, we must examine the record to determine whether, viewed in the light most favorable to the government, there is sufficient evidence of a single conspiracy to support the verdict. *United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978).

At trial, the government proved the existence of an international drug ring that grossed millions of dollars. In the summer of 1978, DiSantis made Raiton a partner in his methamphetamine laboratory in Plymouth Meet-

ing near Philadelphia. The two men soon decided to expand production, and opened a new laboratory in Upper Darby. This facility was shut down after DiSantis and one of the chemists were arrested for narcotics possession, but DiSantis and Raiton later started another one in Bucks County and hired a different chemist. During this time, the partners employed Gomberg and Spielvogel, who formed sham companies to purchase the essential ingredients for methemphetamine, particularly P2P. Levy, an attorney who shared office space with the partners, was retained in an attempt to gain the release of a shipment of P2P seized by federal drug agents.

DiSantis and Raiton also arranged to have P2P brought into the United States from France and Germany. Some deliveries were sent to a sham company in Philadelphia; others were routed through Miami. In addition, Levy organized a forwarding company in Canada to import the European P2P and hold it for shipment into the Philadelphia area.

When the supply of P2P exceeded their own manufacturing needs, DiSantis and Raiton began to sell the chemical to other drug dealers. The partners hired D'Amico to assist Gomberg in making deliveries and collecting money. On one occasion, D'Amico siphoned P2P into smaller containers in a ruse to throw drug enforcement agents off the trial.

DiSantis and Raiton continued their mutual dealings even after the partnership was dissolved in late 1979. DiSantis kept the methamphetamine operation, and Raiton supplied him with P2P. During this time, Spielvogel was instrumental in smuggling P2P into the United States from the Bahamas. The entire operation was finally broken up after Raiton and one of his customers agreed to cooperate with the government in 1981.

These facts suffice to show the existence of a single conspiracy in which all defendants knowingly participated. A division of labor among conspirators in pursuit of a

common goal does not necessitate a finding of discrete schemes. *See United States v. Elam*, 678 F.2d 1234, 1246-47 (5th Cir. 1982); *United States v. Boyd*, 595 F.2d at 123. Moreover, the trial judge explicitly directed the jury's attention to the unitary conspiracy issue. *See also United States v. Kenny*, 462 F.2d 1205, 1217 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). He charged the jury: "What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed then you must acquit the defendants as to that charge. . . . In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other separate conspiracy." In applying these instructions to the evidence, the jury could reasonably find that defendants had all agreed to participate in one common drug enterprise.

In a related argument, defendants contend that the trial judge erred in refusing to instruct the jury that a defendant could be found guilty only if "he agreed to perform the two things charged, to manufacture methamphetamine and to distribute P2P." The jury was told instead that "one may become a member of a conspiracy without full knowledge of all of the details of the alleged unlawful scheme. . . . So if a defendant with an understanding of the unlawful character of a plan knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy. . . ."

These instructions were proper. The test for conspiracy is whether a defendant agreed to participate in an unlawful scheme, with knowledge of its "essential nature." *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). A conspirator need not know all the details of the enterprise, *United States v. Boscia*, 573 F.2d 827, 834 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978), nor join in all its illegal objectives. *See also United States v. Mur-*

ray, 618 F.2d 892, 898 (2d Cir. 1980); *United States v. Carman*, 577 F.2d 556, 567 (9th Cir. 1978); *United States v. Bolts*, 558 F.2d 316, 325-26 (2d Cir.), *cert. denied*, 434 U.S. 930 (1977).[1]

Finally, some defendants contended at trial that their participation in the conspiracy ended before P2P was listed as a controlled substance in February 1980. They attack their convictions on the ground that the jury might have found that their roles were limited to possessing and distributing P2P at a time when it was not illegal to do so.

The limiting instruction given by the trial judge met the defendants' objection. The jury was told that a conspiracy merely to deal in an uncontrolled substance was not illegal. The judge carefully explained that a defendant implicated "solely in the possession, importation or distribution of P2P before that time [February 1980]" could not be found guilty, "unless he knew that the P2P was to be used in the manufacture of methamphetamine . . . and . . . he joined the conspiracy with the intent of aiding the conspiracy to carry out that illegal purpose." This limiting interpretation of the conspiracy did not amount to an improper amendment of the indictment, *see United States v. Milestone*, 626 F.2d 264 (3d Cir.), *cert. denied*, 449 U.S. 920 (1980), nor did it deny defendants notice of the crime charged.

In short, we find no reversible error on the conspiracy convictions.

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1. In the case at hand, the government proceeded on the theory that a person who joins a conspiracy having two unlawful aims is guilty even if he agrees to only one of them. Defendants complain that the trial judge concurred with the government on this point at a side bar conference. However, they cite no authority to show that this view of the law is wrong, and the *Murray*, *Carman* and *Bolts* cases indicate otherwise. In any event, the judge did not instruct the jury on the "one-is-enough" theory, and therefore the defendants' complaint is without substance.

II

DiSantis argues that he was sentenced improperly on Counts Two through Five. After being found guilty on all counts, he received the following sentences:

COUNT	VIOLATION	SENTENCE
I	Conspiracy to manufacture and distribute methamphetamine, and to distribute and possess with the intent to distribute P2P; 21 U.S.C. §846	Five years imprisonment and a $15,000 fine
II	Manufacture of methamphetamine; 21 U.S.C. §841 and 18 U.S.C. §2	Five years imprisonment, followed by five years special parole, and a $15,000 fine; consecutive to Count I
III	Possession with the intent to distribute methamphetamine; *id.*	Five years imprisonment, followed by five years special parole, and a $15,000 fine; consecutive to Count II
IV	Aiding and abetting the manufacture of methamphetamine; *id.*	Five years probation; consecutive to Count III
V	Attempt to possess with the intent to distribute P2P; 21 U.S.C. §846	Five years probation; concurrent with Count IV
VI	Continuing criminal enterprise; *id.* §848	Ten years imprisonment; concurrent with Counts I and II

In sum, DiSantis was sentenced on the conspiracy and substantive counts to a $45,000 fine and fifteen years in prison, followed by five years of special parole and five more years of probation. He also received a concurrent ten-year term for the section 848 continuing criminal enterprise count.

In *United States v. Gomez*, 593 F.2d 210, 212 (3d Cir.), *cert. denied*, 441 U.S. 948 (1979), we observed that the Comprehensive Drug Abuse Prevention and Control Act separates the various acts that establish criminal liability into discrete components. Correspondingly, "the penalty provisions of the Act have been orchestrated in meticulous detail." *Id.* at 213. The severity of the allowable sentences depends in part upon the type of drug, the intended use, the defendant's prior convictions, and the age of the consumer.

The Act makes conspiracies subject to punishment separate and apart from the substantive offenses. 21 U.S.C. §846. In addition, section 848 imposes severe, separate penalties on individuals who engage in continuing criminal enterprises.[2] This section reaches indi-

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2. Section 848 provides in part:

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources."

Section 848(c) prohibits suspension of sentence, probation and parole.

viduals found guilty of felonies that are committed as part of a continuing series of violations of the Act. The defendant must reap substantial gain from these offenses, and undertake them in concert with five or more other persons whom he oversees in a managerial capacity.

Section 848 subjects first offenders to mandatory prison terms ranging from ten years up to life. A defendant may also be fined as much as $100,000 and ordered to forfeit the profits obtained from the enterprise. No sentence may be suspended, and probation and parole are prohibited.

The evidence in this case amply supports the verdict against DiSantis on all counts, and the ten-year sentence on Count Six is the minimum provided by section 848. Defendant argues, however, that *Jeffers v. United States*, 432 U.S. 137 (1977), requires us to vacate his sentences on Counts One through Five as cumulative to the penalty imposed on him for the continuing criminal enterprise.

We begin by considering how *Jeffers* bears on the sentence on Count One for conspiracy. In that case, a defendant was charged in one indictment with a conspiracy violating section 846, and in another with a continuing criminal enterprise violating section 848. After successfully resisting the government's motion to try the two charges together, he was convicted of conspiracy at the first trial and sentenced to fifteen years imprisonment plus a $25,000 fine. At the second trial, he was found guilty of engaging in a continuing criminal enterprise and given the maximum sentence of life imprisonment in addition to a $100,000 fine. This sentence was made consecutive to the first one.

The defendant in *Jeffers* argued that the second trial violated the ban against successive prosecutions for the same offense. He contended that for double jeopardy purposes a section 846 conspiracy is a lesser included offense of a section 848 continuing criminal enterprise.

A divided Supreme Court rejected the defendant's double jeopardy claim. Four members of the Court reasoned that the defendant's opposition to a consolidated trial waived any viable defense to consecutive prosecutions for the same offense. Justice White concurred in affirming the section 848 conviction, but on different grounds.

In discussing the double jeopardy issue, the plurality opinion by Justice Blackmun assumed *arguendo* that conspiracy is a lesser included offense of a continuing criminal enterprise. *Id.* at 149-50. The plurality clearly stated, however, that it was not deciding this issue: "[B]efore this case it was by no means settled law that §846 was a lesser included offense of §848. . . . Even now, it has not been necessary to settle that issue definitively." *Id.* at 153 n.20.

The plurality then considered whether Congress intended to permit cumulative punishments under sections 846 and 848. Justice Blackmun noted that this multiple punishment issue would arise even if the two indictments had been tried together, *id.* at 154 n.23, thus treating the situation like the trial of Counts One and Six in the case at hand. Although he found the legislative history "inconclusive", *id.* at 156, Justice Blackmun observed that the usual policy offered in support of separate punishments for a conspiracy and its underlying substantive offenses does not apply to these two provisions. The additional dangers posed by section 846 conspiratorial activity are already encompassed by the "in concert" requirement of section 848, and "[t]hus, there is little legislative need to further this admittedly important interest by authorizing consecutive penalties from the conspiracy statute." *Id.* at 157.

Although the plurality recognized that the trial court had "the power to sentence [the defendant] to whatever penalty was authorized" by section 848, it concluded that the second fine imposed on the defendant must be reduced so that the total amount on the two

convictions did not exceed $100,000 — "the maximum permitted by §848." *Id.* There was no need to consider the defendant's two prison sentences, however, since he was not eligible for parole at any time on the section 848 life term. *Id.* at 155 n.24. The four justices who dissented from the affirmance of the section 848 conviction on the ground that it violated double jeopardy concurred in the judgment to the extent that it vacated the cumulative fines.

Because of the diverse views espoused by the justices, *Jeffers* holds only that a defendant found guilty of both a section 846 conspiracy and a continuing criminal enterprise may not be fined in excess of the maximum authorized by section 848. This narrow holding does not dictate that we vacate the prison term imposed on DiSantis for conspiracy.[3] Nevertheless, like the plurality in *Jeffers*, *id.* at 156 n.26, we discern a congressional intent against cumulative punishment in the structure of the Comprehensive Drug Abuse Prevention and Control Act itself.

By authorizing life imprisonment without parole, the most severe sentence short of execution that can be imposed, Congress provided the courts with expansive power to punish a defendant who engages in a continuing criminal enterprise. There are substantial economic sanctions as well. As mentioned earlier, section 848 au-

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3. *Jeffers* has often been cited inaccurately as holding that a conspiracy is a lesser included offense of a continuing criminal enterprise. *See, e.g.*, United States v. Barnes, 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). Some cases have even construed this purported holding as requiring that a conviction and sentence under section 846 must be set aside when the defendant is also found guilty at the same trial of violating section 848. *See* United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3685 (U.S. March 21, 1983); United States v. Lurz, 666 F.2d 69, 75, 81 (4th Cir. 1981), *cert. denied*, 445 U.S. 1005 (1982); United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979). In these three cases, the government conceded that this interpretation of *Jeffers* was correct.

thorizes the trial court to fine a defendant up to $100,000 and strip him of his profits and interests in the enterprise. To pyramid an additional sentence for conspiracy, whether a prison term or a fine, would "undermine and distort the detailed penalty scheme which Congress so carefully constructed" in the Act. *United States v. Gomez*, 593 F.2d at 214. Our review of the statute persuades us, therefore, that Congress did not intend the courts to impose a penalty for a section 846 conspiracy in addition to the section 848 sentence.

Since DiSantis also attacks his sentences on Counts Two through Five, we must decide whether the ban on cumulative sentencing applies as well to the substantive drug offenses used as predicates for a continuing criminal enterprise charge.[4]

The Supreme Court did not consider this question in *Jeffers*, and the courts of appeals are not in agreement. Much of the confusion in the appellate opinions results from a failure to recognize that the holding in *Jeffers* is limited to the relationship between a continuing criminal enterprise and conspiracy, and that the Court did not decide the lesser included offense issue. Nor do the cases always respect the distinction in double jeopardy analysis between successive prosecutions and multiple punishments.[5]

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4. The trial judge charged the jury on Count Six that the government must prove defendant committed three or more of the offenses charged in Counts Two, Three, Four or Five as part of a continuing series of violations of the federal drug laws. Since defendant was found guilty on all of these counts, we need not decide whether conviction on three or more substantive offenses is necessary for conviction under §848. *Compare* cases collected in United States v. Lurz, 666 F.2d 69, 78 (4th Cir.), *cert. denied*, 455 U.S. 1005 (1982), *with* those collected in United States v. Michel, 588 F.2d 986, 1000 n.15 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979).

5. *See, e.g.*, United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3685 (U.S. March 21, 1983) (relying on *Jeffers* to reverse conviction under §846 as lesser included offense of §848, but affirming without discussion conviction on sub-

In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the Supreme Court observed that the fifth amendment guarantee against double jeopardy forbids three separate evils: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. Under the test established in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), two offenses are the same for double jeopardy purposes unless each one requires proof of a fact that the other does not. The *Blockburger* test always deems a lesser included offense the same as the greater because by definition the greater offense includes all the elements of the lesser. By their nature, the predicate violations in a compound statute like section 848 are lesser included offenses.

At the time *Jeffers* was written, however, the Court had become equivocal about whether the double jeop-

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NOTE — (*Continued*)

stantive counts); United States v. Chagra, 669 F.2d 241, 261-62 n.30 (5th Cir.), *cert. denied*, 51 U.S.L.W. 3255 (U.S. Oct. 4, 1982) (vacating §841 fine as cumulative to §848 fine, as required by "[t]he discussion of Congressional intent in *Jeffers*"); United States v. Chagra, 653 F.2d 26, 32 (1st Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (citing *Jeffers* for proposition that the legislative "history might suggest an intent not to punish for both the §848 violation and the offenses used to prove that violation"); United States v. Barnes, 604 F.2d 121, 155-56 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) (relying on *Jeffers* as authority against imposition of penalty for conspiracy on defendant given maximum sentence on §848, but affirming additional sentence for substantive offenses); United States v. Valenzuela, 596 F.2d 1361, 1364-65 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979) (rejecting argument that *Jeffers* requires court to vacate prison sentences for conspiracy and predicate offenses imposed on defendant who also received life imprisonment under §848); United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979) (citing *Jeffers* as authority against consecutive sentences on §§846 and 848, but affirming without discussion additional prison terms for substantive violations).

ardy clause offers independent protection against cumulative punishment. In later cases, a clear majority finally emerged for the proposition that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 51 U.S.L.W. 4093 (U.S. Jan. 19, 1983). Thus, the propriety of cumulative sentencing is entirely a legislative matter, and the lesser included offense rationale is often a misleading way to discern congressional intent in predicate offense statutes.

The *Blockburger* test still may be used to ascertain the legislative aim when it is not otherwise expressed, since Congress ordinarily does not intend to punish the same offense under two different statutes. *See Whalen v. United States*, 445 U.S. 684, 692 (1980). But as Justice Rehnquist pointed out in his *Whalen* dissent, the *Blockburger* test is "less satisfactory, and perhaps even misdirected, when applied to statutes defining 'compound' and 'predicate offenses.' " *Id.* at 708. In these situations, *Blockburger* should be used with caution, bearing in mind that the question to be resolved is legislative intent, not double jeopardy. If the congressional purpose as to cumulative punishment can be discerned from the language of the statute, its structure, or its legislative history, then the inquiry is at an end. *See Albernaz v. United States*, 450 U.S. 333, 340 (1981). Recourse to the *Blockburger* test is appropriate only if these sources fail.

We need not resort to *Blockburger* here. As we see it, the structure of the Act, with its series of graduated penalties culminating in the extremely harsh punishment for continuing criminal enterprises, shows that Congress intended the courts to rely on section 848 alone for sentencing purposes. Cumulative sentences on the underlying predicate violations are not necessary to carry out the congressional purpose of severely punishing the leaders of narcotic rings.

In short, we conclude that Congress did not intend a defendant found guilty of a continuing criminal enterprise to be punished as well for conspiracy and substantive predicate offenses. The DiSantis case must therefore be remanded for resentencing.

We are not unmindful of the practical problems that confront district judges in sentencing defendants like DiSantis. In *United States v. Gomez*, 593 F.2d at 213, we rejected the contention that a trial court should enter judgment of conviction on the most inclusive offense alone, and not on those counts for which cumulative sentences are forbidden. As we pointed out, a defendant might avoid all punishment for his crimes if an appellate court reversed the single conviction on the compound offense but would have upheld the convictions on the less inclusive counts. To avoid that possibility, we directed the district court to impose a general sentence on all counts for a term not exceeding the maximum possible sentence on the count authorizing the greatest penalty. *Id.* at 216-17. *See United States v. Corson*, 449 F.2d 544 (3d Cir. 1971); *see also Zant v. Stephens*, 51 U.S.L.W. 4891, 4896 and n.21 (U.S. June 21, 1983).

One of the concerns expressed in *Gomez* was that on remand the double jeopardy clause might prevent the trial judge from imposing a greater sentence on the remaining counts than he had originally ordered. 593 F.2d at 217 n.18. Since then, we held in *United States v. Busic*, 639 F.2d 940, 950 (3d Cir.), *cert. denied*, 452 U.S. 918 (1981), that the Constitution does not forbid a district court from resentencing a defendant *de novo* and imposing a more severe sentence if it so chooses.[6] To

6. As part of an overall sentencing plan for the defendants in *Busic*, the district court distributed the heaviest penalties on the counts that were later reversed, and imposed lighter punishments on the other counts. We remanded for resentencing on the counts that were upheld, without limiting the trial judge to the prison terms he had originally assessed. Since the maximum penalty provided by statute on the surviving counts made it impossible for the

avoid the necessity for remands, the general sentencing procedure recommended in *Gomez* should be followed in cases where a defendant convicted under section 848 is also found guilty of conspiracy or substantive offenses.

All of the defendants' convictions will be affirmed, as will all of the sentences except those imposed on Joseph DiSantis, Jr. His case will be remanded to the district court for imposition of a general sentence consistent with this opinion.

APPENDIX

The following contentions, reproduced verbatim from the defendants' briefs, are rejected as without merit. All defendants adopt each others' arguments to the extent they are applicable.

David Gomberg, appellant in Nos. 82-1258/1534:

— The joinder of the defendant with co-defendants against whom the government had voluminous evidence of crimes unrelated to the defendant was prejudicial and impermissible.

— The second trial of the defendant on charges arising from the same drug conspiracy violated the double jeopardy clause.

— The charges of manufacturing and aiding and abetting the manufacturing constituted a single continuous offense and convictions on both charges constitute double punishment.

Harold Levy, appellant in No. 82-1477:

— Appellant should have been afforded relief for the government's conduct in making a material witness unavailable to him.

NOTE — (*Continued*)
sentence on remand to exceed the total previously imposed, we did not have to decide whether the new aggregate sentence may be greater than the original one. 639 F.2d at 953 n.14.

— Appellant should have been permitted to subpoena at trial records of the Internal Revenue Service, the U.S. Probation Office, and the New Jersey state probation office concerning the government's chief witness.
— A letter referring to appellant should have been excluded from evidence as inadmissible hearsay.
— A mistrial should have been declared when the government rebutted appellant's closing remarks by way of pejorative and prejudicial remarks concerning appellant and appellant's counsel.
— The sentence imposed upon appellant was unduly harsh and so disparate when compared with sentences imposed upon other co-conspirators as to violate appellant's constitutional rights.
— The indictment should have been dismissed as a result of the government's misconduct in connection with the investigation of this case.

Michelle D'Amico, appellant in No. 82-1478:
— The defendant D'Amico was entitled to a new trial in light of the fact that the trial court erred in denying the defendant's motion for mistrial.

Albert Spielvogel, appellant in No. 82-1479:
— There was insufficient evidence upon which the jury could have returned a verdict of guilty as to Count Two and appellant's motion under Rule 29(c) was improperly denied.
— Convictions on Counts One and Two must be reversed due to the admission of evidence of other crimes which unfairly prejudiced the jury.
— The trial judge improperly refused to require the government to turn over *Brady* material and denied the defendant access to *Brady* material.

Joseph DiSantis, Jr., appellant in No. 82-1485:

— Appellant's conviction on Count 1, the conspiracy count, should be reversed because of erroneous jury instructions and because one of the objectives of the conspiracy, distribution of phenylacetone, is not a federal crime due to its placement on controlled substances Schedule II through defective administrative procedure.

— The convictions on Counts 2 and 3 should be vacated and the case remanded for either dismissal or a new suppression hearing due to the grossly negligent, and possible willful, misrepresentation by the prosecutor to the court and defense concerning a material issue of fact at the suppression hearing.

— Appellant's conviction and sentence for manufacture of methamphetamine on Count 4 must be vacated because it is the same manufacturing offense charged in Count 2; such single offense was divided into two separate counts by reference to arbitrary temporal limits, not proper units of prosecution under 21 U.S.C. §841.

— Appellant's conviction on Count 5 must be reversed due to the doctrine of legal impossibility.

— The Count 6 continuing criminal enterprise conviction should be reversed: (1) due to the doctrine of collateral estoppel which barred admission of cocaine conspiracy activities which, in part, were the subject of appellant's earlier federal acquittal of conspiracy to deliver cocaine; (2) the uncharged cocaine transactions were not part of the "continuing series of violations" charged in this indictment; (3) some or all of the predicate offenses are flawed and jury's general

verdict on Count 6 could have been based on a flawed predicate.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF :

AMERICA, Respondent, :

v. : No. Term, 1983

ALBERG SPIELVOGEL, :

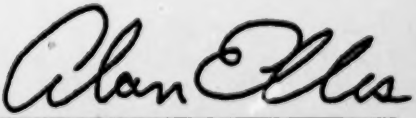
Petitioner. :

PROOF OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit upon the person and in the manner indicated below which service satisfies the requirements of Rule 28 of the Rules of the Supreme Court of the United States, service by pre-paid first class mail addressed as follows:

Edward Dennis, Esquire
United States Attorney
United States District Court
Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106

ELLIS, FOGELNEST and NEWMAN

By 

ALAN ELLIS
Attorney for petitioner

Dated: Nov. 23, 1983